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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-1585 and 78-1681

STATE OF LOUISIANA,

Petitioner,

STATE OF TEXAS,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**BRIEF IN OPPOSITION FOR RESPONDENT
NATURAL GAS PIPELINE COMPANY OF AMERICA.**

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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**BRIEF IN OPPOSITION FOR RESPONDENT
NATURAL GAS PIPELINE COMPANY OF AMERICA.**

Natural Gas Pipeline Company of America (Natural), a respondent herein and an intervenor in the court below, opposes the petitions for writ of certiorari filed by the State of Louisiana (Louisiana) and the State of Texas (Texas) to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-captioned proceeding. The opinion of the Fifth Circuit is reported *sub nom. Public Service Company of North Carolina, et al. v. Federal Energy Regulatory Commission* at 587 F. 2d 716 (1979).

QUESTION PRESENTED.

Whether the Court of Appeals correctly affirmed orders¹ of the Federal Power Commission (now succeeded by the Federal Energy Regulatory Commission, collectively referred to herein as "Commission") requiring that abandonment approval be obtained pursuant to Section 7(b) of the Natural Gas Act prior to the State of Texas' (Texas) withdrawing gas from service in interstate commerce.

STATEMENT.

The underlying facts involve a sale of gas in interstate commerce for resale by Superior Oil Company (Superior), to Natural, a major interstate gas pipeline. Both Natural and Superior are natural gas companies subject to the jurisdiction of the Commission. The gas sold by Superior to Natural includes gas which is attributable to the royalty share of Texas, the lessor of the leases from which the gas is produced.

Pursuant to a pooling agreement dated January 1974, Texas was given the option to take its royalty gas in kind. The pooling agreement between Superior, Texas and Natural stated "[t]he rights and obligations of Superior and Natural shall be subject to the receipt and acceptance of any and all necessary approvals of the Federal Power Commission". Texas exercised its option to take gas in kind.

On April 25, 1975, Texas by letter advised the Commission that Texas would take its royalty gas in kind. The Commission by letter to Texas dated June 13, 1975 stated Superior had not been authorized to divert gas from the interstate market without abandonment approval. On May 1, 1975, Texas, on behalf of

1. *Public Service Co. of North Carolina, Inc.*, FPC Docket No. RP76-103, Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandonment Authorization, and Denying Oral Argument (issued April 26, 1977) and Order Denying Rehearing (issued July 6, 1977).

the School Land Board of Texas, an agency of Texas, entered into a gas purchase agreement to sell the royalty gas to Public Service Company of North Carolina, Inc. (Public Service).

More than a year later, Public Service filed a petition for declaratory order with the Commission asking

[t]hat the Commission issue a declaratory order determining that it has no jurisdiction under the Natural Gas Act to require that abandonment authority be sought prior to the sale and delivery of the State of Texas' royalty gas to Public Service.

The Commission requested briefs concerning the jurisdiction of the Commission over the proposed withdrawal of gas from service to Natural. Natural and others responded to the Commission's request. Natural's brief emphasized that abandonment approval must be obtained before withdrawing gas from service to Natural.

On April 26, 1977, the Commission issued a declaratory order that "Texas, or its agency, *and Superior* must obtain abandonment authorization under Section 7(b) of the Natural Gas Act" before the subject gas could be withdrawn from sale to Natural. *Public Service Co. of North Carolina, Inc.*, Docket No. RP76-103, Order (issued April 26, 1977). Emphasis added.

Public Service, Texas and Louisiana filed applications for rehearing with the Commission. Rehearing was denied by the Commission on July 6, 1977. Petitions for review of the Commission's April 26, 1977 and July 6, 1977 orders were filed in the Fifth Circuit by Public Service, by Texas and by Louisiana.

The Fifth Circuit upheld the Commission orders. Although the Fifth Circuit made no independent holding on Superior's abandonment duty, the court ordered that the Commission's orders be "ENFORCED". 587 F.2d at 721. The Commission's orders held that both Texas and Superior must obtain abandonment

authority.² In the body of its opinion, the court recognized that the Commission's orders dealt with Superior's duty to obtain abandonment approval.³ The court recited the following language from the Commission's Declaratory Order:

Texas, or its agency, *and Superior must obtain abandonment authority under Section 7(b) of the Natural Gas Act.*

Id. at 718. Emphasis added. Furthermore, the court stated since we find that the Commission can directly require Texas to seek abandonment, we need not consider Texas's argument that such could not be done indirectly through Superior.

Id. at 719, n. 11.

REASONS FOR DENYING THE WRIT.

The writ should be denied. In their petitions, Texas and Louisiana have argued that the Commission's orders constitute an "unprecedented extension of Commission jurisdiction over states and state agencies". However, the jurisdictional status of the gas itself, not the parties, is the key issue. The gas at issue is dedicated to service to Natural in interstate commerce, remains subject to the Commission's jurisdiction under the Natural Gas Act, and cannot be withdrawn from service to Natural prior to Commission issuance of abandonment approval. Because Superior, the jurisdictional producer, must obtain abandonment approval before withdrawing gas service from Natural, any determination of Texas' and Louisiana's claims of "unprecedented extension of Commission jurisdiction", even if resolved in their favor, would still not dispose of the underlying abandonment issue. Therefore, such claims do not offer sufficient grounds for this Court to grant certiorari.

2. At this time, neither Superior nor Texas has applied for or received abandonment approval from the Commission.

3. Briefs filed in the Fifth Circuit which deal with Superior's abandonment approval include Initial Brief of the State of Texas, at pages 20-27, Brief for Respondent Federal Energy Regulatory

(Footnote continued on next page.)

I.

The Commission Has Jurisdiction Over the Gas Regardless of Texas' Interest in the Gas Under State Law.

The Court of Appeals correctly held that a continued service obligation attached to the subject gas regardless of Texas' involvement. Therefore, abandonment approval is required by Section 7(b) of the Natural Gas Act prior to the withdrawal of the gas from service to Natural. Obtaining such abandonment approval is required of the producer, Superior, regardless of Texas' involvement.

Questions of whether a state is a "natural-gas company" and whether a state can be subject to the abandonment provisions of the Natural Gas Act need not concern the Court in this case. The significant fact is that the gas has been dedicated to service to Natural in interstate commerce and remains so dedicated, regardless of Texas' interest in the gas under state law. Only after abandonment approval is obtained may the gas be withdrawn from the jurisdictional service to Natural. The gas remains subject to the Commission's jurisdiction regardless of the fact that Texas is the owner of a royalty interest in the jurisdictional gas. Superior, the jurisdictional producer, must obtain abandonment approval.

As Texas itself recognized in its Initial Brief before the Fifth Circuit, a ruling

that Texas need not obtain abandonment authorization but Superior must, still gives Commission veto power over any disposition Texas wishes to make of its royalty gas.

Id. at 21. In light of the obligation of Superior, a jurisdictional producer, to obtain abandonment approval prior to withdrawing gas from jurisdictional service to Natural, any determination of the claimed "extension of Commission jurisdiction over states",

(Footnote continued from preceding page.)

Commission, at pages 23-24, Initial Brief of Public Service Company of North Carolina, Inc., at pages 18-23, and Brief of Intervenor Natural Gas Pipeline Company of America at pages 6-13.

even if resolved in Texas' and Louisiana's favor, would not be dispositive of the underlying abandonment issue, and, therefore, such claims would not constitute sufficient grounds for this Court to grant certiorari.

II.

Abandonment Approval Is Required Before Withdrawing Any Gas from Jurisdictional Service to Natural.

Section 7(b) of the Natural Gas Act provides in full

[n]o natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

15 U. S. C. § 717f(b).

There is no exception to the requirement that abandonment approval be obtained prior to withdrawing gas from jurisdictional service. The subject sale of the royalty gas by Superior to Natural is "service" within the meaning of Section 7(b). It is well established that Section 7(b) applies to sales made by producers to interstate pipelines. Such sales constitute "service" within the meaning of this Section. *Sunray Mid-Continent Oil Co. v. FPC*, 364 U. S. 137 (1960); *Atlantic Refining Co. v. Public Service Commission*, 360 U. S. 378 (1959); *Hunt Oil Co. v. FPC*, 334 F. 2d 474 (5th Cir. 1964); *Michigan Consolidated Gas Co. v. FPC*, 283 F. 2d 204 (D. C. Cir. 1960), *cert. denied*, 364 U. S. 913 (1960); *J. M. Huber Corp. v. FPC*, 236 F. 2d 550 (3d Cir. 1956), *cert. denied*, 352 U. S. 971 (1956).

Section 7(b) was intended to protect consumers of interstate gas. *Sunray Mid-Continent Oil Co. v. FPC*, *supra*. The

Commission can carry out the purposes of Section 7(b) only through an examination of each factual situation to determine whether the proposed abandonment can be authorized in compliance with the statutory standards. That the subsequent disposition is intended to be made by a non-jurisdictional entity, Texas, is of no relevance to the issue of whether a jurisdictional seller, Superior, must obtain approval prior to withdrawing the gas from jurisdictional service.

California v. Southland Royalty Co., 436 U. S. 519 (1978), decided by this Court last term, held that gas subject to a lease which under state law had reverted to the lessor cannot be withdrawn from interstate service prior to receipt of abandonment approval because "the obligation to serve the market had already attached to the gas". *Id.* at 528; emphasis in original. *Southland* recognizes and gives effect to two long-standing basic principles consistently applied by this Court in construing the Natural Gas Act. One principle is that jurisdiction follows the physical flow of gas. *See California v. Lo-Vaca Co.*, 379 U. S. 366 (1965). The other principle is that the abandonment provisions of Section 7(b) of the Natural Gas Act are of foremost importance. *See Sunray Mid-Continent Oil Co. v. FPC*, *supra*.

There is no reason for this Court to depart from its position in *Southland* which controls disposition of the instant case. In both *Southland* and the present case, provision was made under state law for return of all or a portion of the gas to the lessor. In both *Southland* and the present case, the lessors desired to divert the gas from jurisdictional service. A vital concern of this Court and the Commission under the Natural Gas Act is the protection of service to consumers. *See, e.g., Sunray Mid-Continent Oil Co. v. FPC*, *supra*. Texas' role as a royalty owner of gas used to provide a jurisdictional service cannot be used to abridge the protections provided consumers by the Natural Gas Act.

Because the obligation to serve consumers in the interstate market attached to the gas, Superior is required to obtain abandonment approval.

Since the gas has been dedicated to interstate commerce, abandonment authorization must be obtained prior to withdrawal of the gas from service to Natural. Even if Texas were not required to obtain such abandonment approval, Superior, the producer, would nevertheless be subject to the statutory abandonment provision.

CONCLUSION.

For the reasons set forth above, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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